MOHAMED SALLEH BIN AWANG & ANOR. v. LOW HAN LEONG & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 6 & September 23, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 102 of 1980]

Tort — Negligence — Road accident — Inadequate and conflicting evidence — Sketch plan.

A collision had occurred on a straight stretch of road between a motor cycle of which the first appellant was the pillion rider and the second appellant was the rider and a motor lorry driven by the second respondent and belonging to the first respondent. The learned Judge found that the evidence was conflicting and inadequate and inexact. In the circumstances he relied on the sketch plan and drew the inference that the second appellant had encroached onto the path of the lorry at the time of the collision and he therefore found that second appellant was liable to the extent of two-thirds. He also found that the second respondent had contributed to the accident by travelling at more than 35 m.p.h. The parties appealed and cross-appealed.

Held, dismissing the appeal and cross-appeal: (1) as neither of the appellants had given a clear account of how the accident happened the learned Judge was justified in relying on the sketch plan from which he correctly drew the inference that that the second appellant was largely to blame for the accident;

(2) the learned judge was justified in finding that the respondents had contributed to the accident by travelling at more than 35 m.p.h.

Case referred to:-

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

FEDERAL COURT.

Mahinder Singh for the appellants.

Philip Yong for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): According to the statement of agreed facts, a collision occurred on February 25, 1976 on a straight stretch of road at or near 9½ milestone Pekan/Kuantan Road between motor cycle No. CE 3890 and motor lorry No. BU 8589.

First plaintiff was the pillion rider and second plaintiff the rider of the motor cycle. First defendant and second defendant are the owner and driver respectively of the motor lorry. Damage was caused to the motor cycle and both plaintiffs also suffered injuries.

It was also agreed at the commencement of the trial that should tne court find the defendants 100% liable, general and special damages would be $50,000 for the first plaintiff and $12,000 for the second plaintiff respectively.

In his judgment the learned trial judge remarked that second plaintiff was unable to give a clear account of how the accident had come to pass. He had merely heard a braking sound, after which there was a collision. He was 3 feet from his near side of the road just before that. He also denied that he was overtaking another motor cycle and had therefore encroached onto the off-side of road. The time he said was about 6.30 a.m., it was misty and visibility limited to about 24 feet. As regards his speed, second plaintiff said that he was travelling at between 40 to 45 m.p.h., he had slowed down on hearing the noise of the approaching vehicle to about 40 m.p.h., (a figure which he subsequently reduced to 30 m.p.h.) at the point of impact.

His Lordship also noted that first plaintiff had likewise not been able to see how the accident had happened and that all he could say was that the motor cycle had collided with the lorry.

Summarising the evidence of second defendant (the lorry driver), the learned trial judge noted that according to him the lorry had come from the opposite direction whilst plaintiffs were overtaking another motor cycle whereupon the collision took place. After impact he had applied his brakes, the steering wheel then jammed so that he could not "pull" (presumably move) the lorry onto his side of the road.

Each party had said that the other party's vehicle did not have its lights on.

Faced with two conflicting and what he clearly considered both inadequate and inexact evidence, the learned judge turned to the sketch plan for a clearer picture of the event. It cannot be denied that the inferences which he drew from what is recorded thereon inclined him to the view that second plaintiff had encroached onto the path of the lorry at the time of the collision, and he therefore found that second plaintiff was liable to the extent of two-thirds, in short that his own negligence had been the major cause of his downfall.

Mr. Mahinder Singh's (for the second plaintiff, the first having abandoned his appeal) criticism of this finding can be condensed to two grounds viz.:

Firstly the trial judge had erred in holding that both plaintiffs had not given a clear account of how the accident had happened, and that the sketch plan and photographs supported the plaintiff's version of the accident;

Secondly, that two scratch marks found at J and K on the sketch plan on the defendant's side of the road, had because of inferences wrongly drawn by the trial judge caused him to find that the second plaintiff was more to blame for the accident, the sort of erroneous inference from facts specifically found which would incline an appellate court on the principle in *Benmax's*(1) case, to upset the finding of a trial court.

With regard to the first ground of appeal, we have compared the testimony of the two plaintiffs with the careful analysis of their evidence in the judgment of the trial court, and can find no fault with his Lordship's conclusion that neither plaintiffs had given a clear account of how the accident had happened. That the collision had taken place suddenly in conditions of poor visibility is common ground, and the cautious approach of the trial court in not relying on the mere oral testimony of either party but considering the probabilities in conjunction with other available evidence particularly that of the sketch plan, is beyond reproach.

That leaves us with the question of whether, as has been suggested, the learned judge had drawn erroneous inferences which have led him to come to

conclude wrongly that second plaintiff was largely to blame, or indeed, responsible for any share of the blame at all.

We can best avoid the hazards of examining that part of his judgment under attack out of context by setting out hereunder in full what comes both before and after his examination of the significance of the scratch marks at J and K: —

"The sketch plan gave a clearer picture of what happened. It showed that after the accident the defendant's lorry was straddling across the centre of the road facing diagonally towards Pekan with its front half in the plaintiff half and its rear half in its own side of the road. There were two distinct brake marks at its rear immediately to the nearside and offside at a distance of 49 feet and 53 feet 4 inches respectively. They ran in a straight line parallel to one another and also to the centre line on the defendant's own side. There were no scratch marks found on the plaintiff's side of the road but there were two scratch marks found at J and K on the defendant's side just slightly on the left of the centre. These ground evidence went merely thus to support the defendant's case and rebut the plaintiff's case that the accident happened on the plaintiff's wrong side. According to the defendant the collision took place to the rear of the lorry on the defendant's side at point I where the road surface was shown to be torn. The parallel tyre marks which ran on the same side of the plaintiff merely supported the defendant's case that he was at all relevant times on his correct side. That the front portion of the lorry was found to be on the plaintiff's side would not necessarily indicate he had been at fault. According to the defendant it was due to the steering being jammed. From the evidence adduced there was nothing to show that that result was not probable. Clearly this could not be the position in which the defendant was at the moment of impact, otherwise it was difficult if not impossible to explain how at the same time the defendant's brake marks were found to be on the defendant's side and parallel to the centre necessarily indicating that before and at the time of the impact he had travelled correctly on his side of the road. If this was not the case then we would expect the brake marks to be in line with the position in which the front half of the lorry was facing.

The plaintiff said that the accident happened on his side of the road that is, on the defendant's wrong side but never in the sketch was there, however, anything to suggest that this was so. In fact all the evidence, other than the fact that the front portion of the lorry was found to be on the plaintiff's side, (which situation was discussed earlier) were found to be on the defendant's side strongly supporting the defendant's case that at the time of the collision, the plaintiff was encroaching on his path in attempting to overtake another motor cycle. It is to be wondered thus whether the plaintiff had even established a prima facie case against the defendant. How could he have done so when the second plaintiff said he did not see anything before the accident? In other words he did not know how the accident happened. Was the second plaintiff therefore saying because he said he was on the correct side at the relevant time, therefore the inference must be drawn that the defendant had knocked on his side? That would be too much an inference for the court to come to. All things being equal, that might be the necessary conclusion to be drawn but where on the contrary tangible evidence indicated that the accident took place on the defendant's side, how could such an inference ever be drawn?"

In short what influenced the trial judge most, and we respectfully agree with him, were the brake or tyre marks clearly resulting from the violent braking of respondent's lorry, shown as parallel lines on the sketch plan. These brake marks he found corroborated respondent's testimony that he was at all relevant times on his correct side of the road, and also made probable that respondent's version of how the front of his vehicle had come to straddle the centre of the road.

We would also agree that the inferences that the scratch marks I and J were probably made by the plaintiff's motor cycle being dragged after impact at point I is a logical consequence of the probability established by the brake marks i.e. that respondent's lorry had been on its correct side of the road at the moment of impact. Accordingly the appeal on this ground should also fail.

We were referred to the Braking Tests tables on page 106 of *Bingham's* Motor Claims Cases 7th Edition by learned counsel for the respondents to support his cross-appeal on the ground that the trial judge had erred in finding that respondents had contributed to the accident by travelling at more than 35 m.p.h.

There was no evidence, apart from the photographs, as to the nature of the road surface. But we believe everyone, including the learned judge, rightly assumed that the accident took place on an asphalt surface. Similarly, there being no evidence to the effect that the road was wet, the assumption seems to be that it was dry at relevant times. The brake marks on the sketch plan would average at 51', which according to the braking tables would place the speed of the vehicle somewhere between 30 to 35 m.p.h. Though the trial judge arrived at a figure of more than 35 m.p.h., a speed of even say 33 m.p.h. would be unreasonable in the condition of poor visibility for a heavy vehicle travelling at well nigh its maximum permissible speed. We would therefore dismiss both the appeal and cross-appeal with costs.

Appeal and cross-appeal dismissed.

Solicitors: *Mahinder & Co.; Cheang Lee & Ong.*

BHANDULANANDA JAYATILAKE v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah Ag. L.P., Salleh Abas & Abdul Hamid F.JJ.) September 23, 1981]

[Kuala Lumpur — Federal Court Criminal Appeal No. 33 of 1981]

Criminal Law and Procedure — Sentence — Giving false evidence — Public interest — Penal Code, s. 194.

This was an appeal from the decision of Ajaib Singh J. reported in [1981] 2 M.L.J. 354. The appellant had pleaded guilty to giving evidence at a murder trial and was convicted and sentenced to 10 years' imprisonment.

Held: (1) it had not been shown that the learned Judge had embarked on any unauthorised or extraneous or irrelevant exercise of discretion and the appellate court should not therefore interfere with the sentence;

(2) the learned trial judge was justified in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law in this country.

Cases referred to:-

(1) *Jamieson* v. *Jamieson* [1952] A.C. 525, 549.

(2) *Attorney-General* v. *British Broadcasting Corporation* [1980] 3 All E.R. 161, 172.

FEDERAL COURT.

Y. Sivaloganathan for the appellant.

Shaikh Daud (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.